

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
Implementation of Section 309(j))	
of the Communications Act -)	PP Docket No. 93-253
Competitive Bidding)	
)	
Amendment of the Commission's)	GN Docket No. 90-314
Cellular PCS Cross-Ownership Rule)	
)	
Implementation of Section 3(n) and)	
332 of the Communications Act)	GN Docket No. 93-252
Regulatory Treatment of Mobile Services)	

COMMENTS OF AIRLINK

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AirLink hereby submits its comments in response to the Federal Communications Commission's ("FCC's" or "Commission's") Further Notice of Proposed Rulemaking ("Further Notice") in the above-referenced dockets. AirLink is an entity being formed to participate in the broadband PCS C block auction as a small business designated entity. AirLink endorses the rule changes proposed by the Commission in the Further Notice as a reasonable and fair approach to promptly proceed with the C block auction and minimize the risk of litigation. In the wake of the U.S. Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*¹, the Commission's proposed changes to its competitive bidding rules are the best means of ensuring competitive opportunities for all designated entities in the C block auction.

¹

63 U.S.L.W. 4523 (U.S. June 12, 1995).

The Commission's proposed rule changes recognize two factors critical to the success of the C block auction and to the development of a competitive wireless market. *First*, the proposed rule changes reflect the market reality that prompt commencement of the auction is critical if C block licensees are to compete with incumbent wireless providers and newly licensed broadband PCS providers. *Second*, the Commission's proposed rule changes minimize the risk of litigation that could delay the start of the C block auction or result in prolonged post-auction challenges to C block licenses.

I. COMMENCEMENT OF THE C BLOCK AUCTION IN AUGUST IS IMPORTANT FOR ALL C BLOCK BIDDERS

A. The C Block Auction Will Produce New Competitive Forces in Wireless Telecommunications

The Commission is on the verge of achieving its goal of creating a robustly competitive wireless market. The Commission's award of the A and B block PCS licenses on June 23, 1995, doubled the level of competition with incumbent cellular providers nationwide. However, as the A and B block auction results demonstrate, the newly licensed PCS competitors generally also are existing competitors. In large part, the A and B block winners are existing large providers of communications services seeking to offer additional services or to offer PCS in areas that complement their cellular service territories. The C block auctions, in contrast, hold the promise for injecting new competitive entrants into the wireless market. These smaller entrants are likely to be the primary source of new competition and to fulfill the Congressional mandate that the FCC disseminate licenses among a wide variety of applicants.²

² 47 U.S.C. § 309(j)(3)(B).

B. The C Block Winners Will Not Be Able to Compete with Other PCS Providers if the A and B Block Winners Have A Significant Head Start

The Commission appropriately recognized in the Further Notice and in its opposition to Telephone Electronics Corporation's ("TEC's") Emergency Motion for Stay, the significant impact that a delay in the C block auction will have on the prospects for a competitive wireless telecommunications market. In its opposition to TEC's successful Emergency Motion for Stay, the Commission aptly noted that a delay in the C block auction "would delay -- and perhaps even imperil -- the many societal benefits that would result from the growth of competition in wireless telecommunications."³

Every day the C block auction is delayed extends the headstart and competitive advantage of the A and B block licensees. The Commission's final award of PCS licenses to the A and B block winners on June 23, 1995, firmly established the minimum headstart of the A and B block licensees over future C block licensees. This headstart will be increased by any further delay in the auction, an extended auction or post-auction litigation. Accordingly, beginning the C block auction on August 29, 1995 is critical to contain the headstart of the A and B block licensees and to promote vigorous competition among all wireless providers.

The competitive impact of a delay in the C block auction also will jeopardize financing for designated entities. One of the key factors in any investor's analysis of a designated entity is the level of competition in the market. In its efforts to attract financing, AirLink has found that there is a direct correlation between delay in the auction and

³ Opposition to Emergency Motion for Stay at 18, *Telephone Electronics Corp. v. F.C.C.*, No. 95-1015 (D.C. Cir. 1995).

investors' perception that the competitive advantage of the cellular providers and the A and B block PCS licensees is insurmountable. If the auction is delayed beyond August 29, 1995, investors will withdraw their financial support for designated entities. As Chairman Hundt noted earlier this year, "every day of delay will cost the economy, the Treasury, the entrepreneurs, and consumers million of dollars and countless opportunities."⁴ AirLink firmly believes that all designated entities will lose if the auction is delayed.

Delay in the auction also will overshadow the incentives for investment in designated entities embodied in the FCC's competitive bidding rules. With dim prospects for attracting investors or strategic partners if the auction is delayed, the level of bidding credits and the magnitude of other incentives designed by the Commission to help designated entities overcome barriers to capital become irrelevant. Commencement of the C block auction on August 29, 1995 is essential to all C block bidders and all designated entities.

II. THE COMMISSION'S PROPOSED RULE CHANGES MINIMIZE THE RISK OF LITIGATION THAT COULD HALT THE AUCTION OR JEOPARDIZE LICENSES POST-AUCTION

The Supreme Court's decision in *Adarand* creates a significant risk of litigation if the FCC proceeds with the auction without modifying its competitive bidding rules. AirLink concurs in the Commission's conclusion that without a supplemental record, the Commission's competitive bidding rules for the C block auction that base incentives on gender and race are unlikely to withstand constitutional challenge. Accordingly, AirLink supports the proposed modifications to the Commission's rules that maintain the same level

⁴ "FCC Urges D.C. Circuit to Expedite Auction Case," FCC News Release, No. 52422 (Feb. 24, 1995).

of incentives for small minority-owned and small women-owned companies but that base those incentives on size rather than race or gender. The Commission's proposed changes are necessary for the C block auction to proceed without litigation-induced delay.

By eliminating race and gender-based preferences, the Commission has proposed revised rules that will protect against a second possible stay of the C block auction and prevent an onslaught of legal challenges to C block licenses after the auction closes. The U.S. Court of Appeals for the District of Columbia Circuit's decision to grant a stay of the C block auction⁵ based on the constitutional challenge alleged by TEC even prior to the *Adarand* decision makes it extremely likely that the auction would once again be stayed if the competitive bidding rules are left unchanged. Even if a stay is averted prior to the auction, licenses awarded to bidders based on the bidders' gender or race will increase the challenges to licenses after the auction closes. Neither of these delays would aid C block bidders or competition in the wireless market.

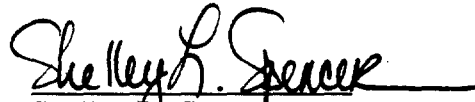
The Commission's proposed rule changes are sensitive to the needs of designated entities and will create the least disruption to existing relationships being formed to bid at the auction. The proposed rules, to the extent possible, preserve competitive opportunities for all designated entities by maintaining the eligibility of small women-owned and small minority-owned companies for the same bidding incentives rather than reducing their eligibility to the level of incentives for small businesses. Although some larger minority-owned and women-owned companies may no longer qualify for the entrepreneur's block

⁵ *Telephone Electronics Corp. v. F.C.C.*, No. 95-1015 (D.C. Cir. Mar. 15, 1995) (order granting stay).

based on their size, there is no acceptable alternative to manage the litigation risk and proceed with the auction. AirLink encourages the Commission to adhere to its size standards. Stringent size standards are central to a competitive auction and a competitive wireless market with diverse service providers.

WHEREFORE, AirLink endorses the rules changes proposed by the Commission in the Further Notice and encourages the Commission to adopt these rules and to adhere to its new auction schedule.

Respectfully submitted,

A handwritten signature in black ink, reading "Shelley D. Spencer". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Shelley D. Spencer

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